FILE COPY

FILED
JUL 25
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 194.

FEDERAL TRADE COMMISSION, *Petitioner*

v.

R. F. KEPPEL & BRO., INC., *Respondent*

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION.

JOHN A. COYLE,
GEO. E. ELLIOTT,
Attorneys for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS.

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statement	2
Argument	4
The Complaint in This Case Did Not Aver, Nor the Evidence Show, the Existence of Unfair Methods of Competition in Commerce	5
This Case Does Not Involve a Substantial and Specific Public Interest	10
Comments on Petitioner's Application for Certiorari	14
Conclusion	19

CITATIONS.

CASES:

Berkey & Gay v. Commission, 42 Fed. (2d) 427	10
Butterick Company v. Federal Trade Commission, 4 Fed. (2d) 910	17
Caha v. United States, 152 U. S. 211	13
Chamber of Commerce of Minneapolis v. Federal Trade Commission, 13 Fed. (2d) 673	17
Cream of Wheat Co. v. Commission, 14 Fed. (2d) 40	7
Douglis, A. S., & Company, Commission Docket No. 1862	15, 16
Farmers Live Stock Commission Company v. United States, 54 Fed. (2d) 375	18
Federal Trade Commission v. Beechnut Company, 257 U. S. 441, 453	6

CASES: Page

Federal Trade Commission v. Gratz, 253 U. S. 421, 6, 8, 13, 16, 17.
Federal Trade Commission v. Klesner, 280 U. S. 19, 28 ..... 10, 19
Federal Trade Commission v. Raladam Company, 283 U. S. 643 ..... 5, 10, 13, 16
Federal Trade Commission v. Raymond Company, 263 U. S. 565, 572 ..... 6, 10
Federal Trade Commission v. Sinclair Refining Company, 261 U. S. 463 ..... 7, 8
Federal Trade Commission v. Winsted Hosiery Company, 258 U. S. 483 ..... 16, 19
Fullinwider v. Southern Pacific Co., 248 U. S. 409, 412 13
Heath v. Wallace, 138 U. S. 573, 584 13
Hills Bros. Co. v. Commission, 9 Fed. (2d) 481 ..... 7, 18
Jones v. United States, 137 U. S. 202, 214-5 13
Northam Warren Corporation v. Federal Trade Commission, 59 Fed. (2d) 196 3
Philip Carey Manufacturing Company v. Commission, 29 Fed. (2d) 49 9
Raladam Company v. Federal Trade Commission, 42 Fed. (2d) 430 5
Royal Baking Powder Company v. Federal Trade Commission, 281 Fed. 744 17
Southern Hardware Jobbers' Association v. Commission, 290 Fed. 773 7
Thornton v. United States, 271 U. S. 414, 420 13

MISCELLANEOUS:

"Confectionery Distribution in United States," Annual Reports, Department of Commerce 12
Federal Trade Commission Act, c. 311, 38 Stat. 717 .. 2, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 194.

FEDERAL TRADE COMMISSION, *Petitioner*

v.

R. F. KEPPEL & BRO., INC., *Respondent*

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION.

OPINION BELOW.

The opinion of the Circuit Court of Appeals for the Third Circuit (R. 371) is reported in 63 Fed. (2d) 81.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Third Circuit was entered January 25, 1933 (R. 383). The

petition for certiorari, under extension of sixty days duly obtained from a Justice of this Court, was filed June 21, 1933. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 5 of the Federal Trade Commission Act.

QUESTION PRESENTED.

Whether the business practices of respondent as hereinafter described constitute unfair methods of competition in commerce within the meaning of Section 5 of the Federal Trade Commission Act (c. 311, 38 Stat. 717).

STATEMENT.

Respondent is a Pennsylvania corporation which has been engaged since 1918 in the business of manufacturing candy in Lancaster, Pennsylvania, and selling it to wholesale dealers and jobbers in Pennsylvania and other states. Petitioner also buys and sells candy manufactured by others.

Among the products of respondent, which it sold and distributed to wholesale dealers and jobbers in interstate commerce in competition with other candy manufacturers when the complaint was filed, were certain packages or assortments of candy as follows:

(a) Assortments in which were contained larger pieces of candy or articles of merchandise to be given as prizes, dependent upon the color of the centers of said candies; (b) assortments in which slips of paper were contained in each wrapper, upon which were printed varying prices to be paid for said candy or that it was free; and (c) assortments containing a number of pieces in which a sum of money was concealed. Respondent has however long ceased to place money in its candy as described in (c).

With its said assortments of candy, respondent furnished display cards truthfully describing the sales plans men-

tioned. The wholesale dealer and jobber customers of respondent resold the assortments to retailers who sold to the purchasing public, but title to the merchandise passed from respondent completely with the sale to the wholesale dealers and jobbers.

The Federal Trade Commission filed complaint on May 2, 1930, charging that the sale of the candy assortments in the manner described was an unfair method of competition in commerce in violation of said Section 5 of the Federal Trade Commission Act (c. 311, 38 Stat. 717, 719). After the filing of answer and taking of testimony, the Federal Trade Commission issued an order directing respondent to cease and desist from packing and selling its product under the sales plans described in (a), (b) and (c) above and furnishing the display cards describing the sales plan, as aforesaid. Complete copy of said order appears in the record (R. 25). Thereupon respondent herein filed its petition for review (R. 333-344) before the Circuit Court of Appeals for the Third Circuit, which, after argument (Woolley, Davis and Thompson, Circuit Judges, sitting) rendered its opinion and judgment in favor of respondent herein on January 25, 1933, as aforesaid, one judge dissenting (R. 371-382).

The opinion quotes with approval from the case of *Northam Warren Corporation v. Federal Trade Commission*, 59 Fed. (2d) 196, wherein it was held that the use of paid testimonials for advertising purposes without disclosing that payment was made therefor was not an unfair method of competition in commerce, to the effect that

> The Federal Trade Commission Act does not purport to establish a decalogue of good business manners or morals. Its purpose is to strike down at their inception practices which are unfair and which, if permitted to run their full course, would result in the creation of a monopoly and an undue restraint of trade.

The court then sustains the contention of respondent in the following language:

The petitioner did nothing against public policy, within the restricted sense of the term, because its acts did not, of themselves, tend to hinder competition nor create monopoly. Whatever they did, their competitors could do. Other candy manufacturers were free to use the same sales methods as those of the petitioner and to obtain their share of the penny candy trade on an equal footing with the petitioner. The testimony shows that a decided majority of candy manufacturers did in fact use similar methods. There is nothing in the petitioner's practices tending to hinder competition or create monopoly.

The answer to the contention that the petitioner's practices constitute a breach of good morals, and, in that respect, unfair methods of competition, is that there is nothing in the case to show deception, fraud, or bad faith affecting its competitors or the ultimate consumer. Display cards sent by the petitioner to accompany the merchandise contain a complete, fair, and accurate description of the sales plans. The consumer receives a piece of candy for his cent and, although he knows that the quantity is relatively less than if no prize were given, he is satisfied to deprive himself of the difference in bulk in exchange for his opportunity to obtain a prize.

The learned Circuit Court of Appeals thereupon concluded that upon a reasonable construction of the Federal Trade Commission Act the Commission had no jurisdiction to make the "cease and desist" order under review, and entered its order accordingly (R. 383).

ARGUMENT.

The ruling of the Circuit Court of Appeals for the Third Circuit is in complete accord with the principles laid down by the pertinent decisions of this Court bearing on the scope of the Federal Trade Commission Act and the jurisdiction of that Commission thereunder. For the Court's convenience this will be shown under specific headings.

The Complaint in This Case Did Not Aver, nor the Evidence Show, the Existence of Unfair Methods of Competition in Commerce.

To demonstrate the soundness of this proposition, a consideration of the judicial definition of the term "unfair methods of competition" is necessary; and, for reasons hereinafter pointed out, this in turn requires an examination of the judicial definition of the term "monopoly". Before entering upon this examination, however, it will clarify the case to point out first that this Court in *Federal Trade Commission v. Raladam Company,* 283 U. S. 643, 647-648, 650, recognized the jurisdiction of the Commission to be limited by its province to aid in the enforcement of the general governmental anti-trust and anti-monopoly policy, approving the conclusion of the Circuit Court of Appeals for the Sixth Circuit to the same effect (42 Fed. (2d) 430). In that case this Court, after considering the legislative history and objects and purposes of the Federal Trade Commission Act, said (p. 650): (Italics ours)

> * * * In that debate the necessity of curbing those whose unfair methods threatened to drive their competitors out of business was constantly emphasized. It was urged that the best way to stop monopoly at the threshold was to prevent unfair competition; that the unfair competition sought to be reached was that which must ultimately result in the extinction of rivals and the establishment of monopoly; that by the words "unfair methods" was meant those resorted to for the purpose of destroying competition or of eliminating a competitor or of introducing monopoly—such as tend unfairly to destroy or injure the business of a competitor; that the law was necessary to protect small business against giant competitors; that it was an effort to make competition stronger in its fight against monopoly; *that unfair competition was that practice which destroys competition and establishes monopoly.* These and similar statements run through the debate from

beginning to end. Although protection to the public interest was recognized as the ultimate aim, comparatively little was said about it.

A further discussion of the legislative history of the Federal Trade Commission Act appears in the dissenting opinion of Justices Brandeis and Clarke in the case of *Federal Trade Commission v. Gratz*, 253 U. S. 421, 433-436.

Turning now to the definition of "unfair methods of competition", in the *Gratz* case, *supra*, where the practice complained of was the refusal of respondents to sell steel ties for binding bales of cotton unless the prospective purchaser would also buy the jute bagging used to wrap the cotton, this Court defined that term as used in the Federal Trade Commission Act as follows (pp. 427-428):

> The words "unfair method of competition" are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.

This definition has been approved in all the later cases. See for example, *Federal Trade Commission v. Beechnut Company*, 257 U. S. 441, 453, and *Federal Trade Commission v. Raymond Company*, 263 U. S. 565, 572.

Thus we have a definition with two branches, viz., practices opposed to good morals and practices against public policy, but each branch contains specific limitations which may not be ignored. It is not sufficient that practices be merely opposed to good morals nor that they be merely against public policy, as the Commission claims in its at-

tempt to broaden its jurisdiction beyond the prior decisions on the subject. It is not enough to take either of the broad expressions "good morals" and "public policy" without the limitations thereon indicated and carefully applied by this Court. Instead the breach of good morals must arise from "deception, bad faith, fraud or oppression"; and the breach of public policy must arise "because of the dangerous tendency unduly to hinder competition or create monopoly." Thus these two lines of opinion can be condensed into the ideas of deception and monopoly. No court has broadened the definition of unfair competition so as to include any case which would not fall within one or the other of these two classes.

Now "monopoly", *i. e.,* practices which tend to restrain trade or create monopoly within the Act, involve resale price maintenance plans, coercion of manufacturers by jobbers through threats of refusal to deal, and similar situations. *Hills Bros. Co. v. Commission,* 9 Fed. (2d) 481; *Cream of Wheat Co. v. Commission,* 14 Fed. (2d) 40; and *Southern Hardware Jobbers' Association v. Commission,* 290 Fed. 773. But note in this connection that in *Federal Trade Commission v. Sinclair Refining Company,* 261 U. S. 463, this Court held that the furnishing by oil refiners to dealers of pumps for nominal rental for handling their products, such use to cease if the dealer used in the pumps the products of others, did not constitute unfair competition.

With this understanding of the scope of the Act, the Commission's order was manifestly improvident because *there was not averred in the complaint, and could not upon the proof subsequently adduced have been averred, facts to show either that competition was being restrained or monopoly created or that there was deception of the public or of competitors.*

There was no charge in the complaint that respondent's sales plan places any restriction on the right of other candy manufacturers to dispose of their merchandise in any manner or through any agency which to them seems desirable,

or any restriction upon the right of the jobbers who dispose of respondent's candies to handle those of other manufacturers, whether such other manufacturers do or do not use the same sales plan. There is no charge in this case that respondent refuses to sell to its customers unless they will agree to refrain from purchasing the candy of other manufacturers. Hence the situation before this Court in the case of *Sinclair Refining Company, supra,* might be said to go further in its tendency to create monopoly than that here involved, but the Court had no difficulty in finding that there was no unfair competition; *a fortiori,* there can be no such competition in the instant case.

Nor was there any allegation in the complaint in this case of misrepresentation, deception or fraud. On the contrary, during the trial counsel for the Commission expressly disclaimed any attempt to charge respondent with a "false, misleading or untrue statement" (R. 70) or with "any intention to deceive the public or the consumer" (R. 71); and on page 70 of the record the examiner stated there was no charge of "false and misleading advertising" and likewise no charge of "any false statement, or false or misleading advertising involved in this case."

This failure of the complaint alone is fatal to the Commission's case, for this Court held in the *Gratz* case, *supra,* that the Commission's order "should follow the complaint; otherwise it is improvident, and, when challenged, will be annulled by the court". Indeed, in comparison with the complaint in that case, set forth by this Court on pages 425-426 of its opinion, the complaint in the instant case, appearing at pages 2 to 6 of the record, shows no substantial difference. Each, after stating that the proceeding is brought under Section 5 of the Act, acting in the public interest, and charging unfair methods of competition, identifies the parties and specifies in detail the practices complained of. The complaint in the *Gratz* case then states that the acts specified "were committed with the purpose,

intent and effect of discouraging and stifling competition in interstate commerce". In the instant case the complaint specifies that the practices "are all to the prejudice of the public and respondent's competitors, and constitute unfair methods of competition in commerce," etc. Similarly, the complaint in this case did not charge "unfair competition within the proper meaning of these words", and the order therefore is a nullity. Cf. *Philip Carey Manufacturing Company v. Commission,* 29 Fed. (2d) 49, where it was held a similarly deficient complaint could not be remedied on appeal.

Aside from the insufficiency of the complaint, there was no evidence of "monopoly", for there is an utter absence in the record of any evidence of coercion, refusal to deal, and the like. Nor was there any evidence of "deception". Indeed, it is not disputed that an entire box of respondent's "break and take" candy contains as much value as any box of straight goods (R. 72) and that respondent makes no greater profit on one kind than the other. The objection is that the value is not distributed equally between the customers. But this is not deception or bad faith.

The record discloses that consumers of this penny goods know precisely by what method of retailing the candies are being disposed of and know the size of the candies they are purchasing; and that what they may receive or what they may pay depends on the contents of the package. There is no element of fraud or deceit here, no misrepresentation, and no unfairness; but on the contrary, as recognized by the Circuit Court of Appeals, explicit information is available to the consumers in carefully prepared and truthful display cards.

It is submitted petitioner has neither averred or proved in this case the existence of any unfair methods of competition in commerce, within the meaning of the Federal Trade Commission Act.

This Case Does Not Involve a Substantial and Specific Public Interest.

The second prerequisite to the validity of an order of the Federal Trade Commission to cease and desist depends upon the presence of public interest, which this court in the case of *Commission v. Klesner,* 280 U. S. 19, held must be "substantial" and "specific". Furthermore, injury to that public interest must be shown from some practice "characterized as deception, fraud or even unfairness", as held in *Berkey & Gay v. Commission,* 42 Fed. (2d) 427, following the opinion of this Court in the *Gratz* case; or a tendency to create monopoly. *Federal Trade Commission v. Raymond Company, supra.*

Hence the two concepts of unfair methods and public interest both depend on monopoly or deception; but it is important to note that public interest even if existent in a given case, can not alone confer jurisdiction on the Commission. As pointed out by this Court in the case of *Raladam Company, supra,* the object of the Act is to protect competitors; and the object of protecting the public interest, while of paramount importance, does not confer additional jurisdiction on the Commission but merely limits the jurisdiction already conferred to handle cases of unfair competition in commerce; so that there must be unfair methods in competition first, and, in addition, public interest which is specific and substantial, before a proceeding by the Commission is justified.

This case fails to show the substantial and specific public interest which is essential to the issuance of a valid order by the Federal Trade Commission, *Federal Trade Commission v. Klesner,* 280 U. S. 19, 28, and *Federal Trade Commission v. Raladam Company, supra,* page 649. The proof shows an absence of a substantial number of competitors affected by the methods criticized. The evidence before the Federal Trade Commission shows that the great majority of the candy manufacturers of the United States

employ the distribution methods of which petitioner complains in this proceeding. As shown by the record (R. 324), 380 out of 450 active members of the National Confectioners Association manufactured and sold "break and take" candies, *i. e.*, only 15 per cent of the candy manufacturers in the Association failed to employ the distribution methods of which petitioner complains in this proceeding, while 85 per cent of the candy manufacturers engaged in the sale of candies through the use of the same methods that the petitioner is seeking to compel respondent to abandon through the instant proceeding. Since the testimony was taken in 1930 the number of members using these sales methods has grown to 425 or approximately 95 per cent. Further, five out of the eight manufacturers who supported the Commission in its complaint against respondent have resumed the sale of "break and take" merchandise, and of the remaining three, two manufacture a product not adapted to this sales plan.

These methods have been recognized factors in the distribution of the so-called "penny goods" candy for many years. There can obviously be no unfair competition, therefore, between the respective manufacturers constituting the majority in the business but merely between the great majority and the small minority of such manufacturers. As a practical matter, therefore, there can not be any substantial issue at stake, and indeed a number of those not using the methods here involved when the testimony was taken, testified they did not because their product was not suited to such methods (R. 101, 270). Clearly, therefore, the manufacturers of those products are not in competition with respondent and with the great majority of the candy manufacturers of the nation.

Thus also there is no unfairness in these methods, which are equally used by the great majority of the candy manufacturers of the country. On the contrary, the proof shows that the demand in the trade for the goods in question comes

from the smaller dealers and enables them to retain a part of their trade against the disastrous competition of the chain stores. The draw pieces or prize assortments which are here involved are the life blood of the small independent candy stores. To withdraw these pieces from their shelves, would result in forcing many of these small merchants out of business. The trade which they now command would revert to the larger retailers or chain stores and concentrate in a relatively few hands the bulk of the penny candy trade (R. 68). Thus the Commission's order would directly tend to produce that condition of monopoly which the Congress sought to prevent.

The official publications of the Department of Commerce of the United States corroborate the fact that the chain stores are the largest single factor in the "straight" candy trade (R. 68). Its Fourth Annual Report on "Confectionery Distribution in the United States" shows the following for the period 1929-1930 (pp. 12-13):

> Table 22 shows a continuing upward trend in sales to chain stores; such sales having increased from 13.3 per cent of the total in 1929 to 16 per cent in 1930. The number of manufacturers using this type of outlet increased from 259 in 1929 to 274 in 1930, this latter figure representing 53 per cent of the total number of firms reporting.
>
> * * * * * *
>
> Sales to jobbers, which remained at 53 per cent of total sales from 1927 to 1929, showed an increase in 1930, directly proportionate to the increased sales to chain stores. *Sales to independent retailers, on the other hand, showed a sharp drop in 1930 compared with 1929,* * * *. (Italics ours.)

In the same Department's report for the period 1930-1931 it appears (p. 14):

> Sales to chain stores, which increased from 13.3 per cent of total sales in 1929 to 16.0 per cent in 1930, continued their upward trend in 1931. The present re-

port shows that during that year 18.0 per cent of all confectionery reported was sold to chain stores. Ten additional manufacturers report sales to this type of customer in 1931. Sales to independent retailers, shown to have been 19.6 per cent of the total in 1930, amounted to 18.5 per cent in 1931. * * *

The courts take judicial notice of such reports of a department of the Government issued in the course of official business.

Jones v. United States, 137 U. S. 202, 214-5.
Heath v. Wallace, 138 U. S. 573, 584.
Caha v. United States, 152 U. S. 211.
Thornton v. United States, 271 U. S. 414, 420.

In this case the Commission is unjustifiably attempting to expand its jurisdiction beyond any reasonable relationship to the purpose and language of the Act of its creation.

Since there was not even a charge of monopoly or deception, the Commission takes the extreme position, as it must upon the facts, that it has jurisdiction merely because of the alleged illegality of, or contravention of public policy by, respondent's sales policy. The Commission stands or falls upon the soundness of the proposition but reference to the careful safeguards with which the Court in the *Gratz* and later cases has surrounded its definition of the term "unfair method of competition" is all that is necessary to show that this position of the Commission is basically false. As held by this court in the *Raladam* case (page 651), it is impossible to conclude "that Congress intended to prevent all sorts of unfair trade practices in commerce apart from their actual or potential effect upon the trade of competitors * * *".

It is apposite too to recall that public policy, no matter how clear, can not supply jurisdiction in this case. See *Fullinwider v. Southern Pacific Co.,* 248 U. S. 409, 412, where it was said "we may grant, if a policy exists, that it may be used to resolve the uncertainty of a law, but it can not be a substitute for a law".

Since the practices here involved are not unfair methods of competition in commerce as that language in the Act has been construed, nor does there exist a substantial and specific public interest, it is unnecessary to inquire whether any other agency of the Federal or state government might have cause to inquire into their legality. It is enough to note that the business methods involved are not within the purview of the Federal Trade Commission Act. The Commission has no jurisdiction to enforce any other law.

Comments on Petitioner's Application for Certiorari.

In the petition for certiorari statistics are cited to show the size of industries, including the candy industry, the grocery industry, the petroleum industry, the ice cream industry, and others, which have gone on record in conventions or through trade practice conferences against the use of lotteries in the sale of their products. Aside from the very questionable value of such data, as will be pointed out, counsel submit this court should not consider any of such new matter. Petitioner took months to prepare its case against respondent and then took testimony in six cities. Despite the ample opportunity thus presented none of this new matter was felt of sufficient importance to be offered in evidence. Nor has there been proper identification of these resolutions by responsible officers of the respective associations with opportunity of cross-examination by counsel for respondent. Counsel submits it comes too late to proffer new evidence for the first time in a petition for certiorari to this Court.

Respondent has been able in the main to verify the statistics cited except in the vital respect that 50 per cent of candy penny goods and bars are sold by means of lottery packages, as asserted on page 13 of the application for certiorari. The Bureau of Foreign and Domestic Commerce, from which the figures on penny goods and bars were obtained, expressly disclaimed to counsel for respondent on

investigation any responsibility for the estimate of 50 per cent. Those officials stated that no record on the relative volume of lottery packages existed in that Bureau or anywhere else, and that after an investigation on the subject they had concluded any estimate would be futile. Hence the estimate of the Commission is based on supposition only, and its accuracy is subject to the gravest doubt which completely destroys the value of petitioner's argument. Further in respect of the resolutions adopted by the various trade associations against the use of prizes in connection with the distribution of their products, it is apparent that the resolution adopted by the National Confectioners Association in 1923, quoted on page 38 of the petition, is the only one really applicable to this case. It is therefore of vital importance that the Association, at a convention held in Chicago on June 19-23, 1933, in effect rescinded the 1923 resolution, when it declined by a large vote to adopt a section of a proposed new code of ethics declaring that practices like those here involved constituted unfair methods of competition. It is fair to assume that the resolutions of the other industries referred to, adopted some years ago and under different conditions than those now prevailing, no longer represent the view of many of those interested.

Furthermore, petitioner seeks to inject into this case the subject of punch boards, which are not employed by the respondents, and which present a different question. When sales attributable to this method of merchandising are eliminated from consideration, the volume of trade affected by this case is reduced greatly below the figures cited by petitioner.

With respect to the case of *A. S. Douglis & Company*, Commission Docket No. 1862, referred to by petitioners on page 14 of their petition, suffice it to say that counsel for the manufacturer amply demonstrated that the Commission has no jurisdiction over the use of punch boards because the admitted facts disclosed no "unfair method of

competition" under Section 5 of the Federal Trade Commission Act as construed by this court, nor any "public interest". Nevertheless, the Commission unjustifiedly swept aside this showing, just as in the instant case, and issued its order to cease and desist. Counsel for respondents are confident that, also just as in the instant case, the Commission's order to cease and desist in the *Douglis* case will be set aside by the courts.

In Point II of the petition, it is averred under (a) that the fact that competitors are free to follow the same sales method is no defense. It is noteworthy that the only decision cited in support of this proposition is that of this court in *Federal Trade Commission v. Winsted Hosiery Company,* 258 U. S. 483, which was a case involving the use of deceptive labels. Hence the *Winsted* case is clearly an instance of a practice "opposed to good morals because characterized by deception, bad faith, fraud or oppression", as that language was used by this court in *Commission v. Gratz, supra.* The doctrine of the *Winsted* case can not be extended, as petitioner seeks to do here, to cover a situation where there is not even an allegation of deception but, as shown by the record (pp. 70-71), an express disclaimer of any charge of deception or false advertising or any intention to deceive the public or the consumer. The quotation from the *Winsted* case on pages 17 and 18 of the application for certiorari clearly shows the limitations of that decision and its inapplicability to this case.

Further, under Point II(b) it is asserted in the petition that the methods of competition here presented are against public policy, and in support of this proposition it is urged that the decision of the Circuit Court of Appeals is in conflict with the decisions of this court in the *Gratz* and *Raladam Company* cases, *supra.* Just wherein the conflict lies is not pointed out, but is left to surmise. In both of these cases the desist orders of petitioner were set aside and it is therefore difficult to see wherein they strengthen petitioner's case. Clearly this unsupported statement of pe-

titioner merits no consideration at the hands of this court. In any event the showing heretofore made amply refutes the contention.

Specifically, all methods of competition tend to reduce the business of competitors, and if successful may effect material decreases in competitive sales. But as this court has repeatedly held in the *Gratz* and later cases, a method of competition is against public policy only where there has been a dangerous tendency unduly to "hinder competition or create monopoly", and it will be remembered that not even a charge of monopoly was made in the complaint of the Commission in this case. Indeed, as pointed out above, the record (p. 324) shows that 85 per cent of the members of the National Confectioners Association employed the sales method complained of when the testimony was taken in this case, and the percentage is now approximately 95 per cent. So surely there is here no tendency to hinder competition or to create monopoly.

In Point III it is urged that the decision of the court below was in conflict with the decision of other Circuit Courts of Appeal. Cases are cited to show that it is no defense to prove that respondent's competitors have practiced the same illegal sales methods. But those cases had to do with situations of deception and bad faith, attempts to control prices through resale maintenance plans or coercion of manufacturers through threats of refusal to deal and similar situations, none of which situations is involved in the instant case.

For instance, the case of *Royal Baking Powder Company v. Federal Trade Commission,* 281 Fed. 744, involved misleading advertising of cream of tartar baking powder, which tended to and did deceive the public and was unfair to competitors; the case of *Butterick Company v. Federal Trade Commission,* 4 Fed. (2d) 910, involved resale price maintenance in violation of the Clayton Act and the Federal Trade Commission Act; the case of *Chamber of Com-*

merce of Minneapolis v. Federal Trade Commission, 13 Fed. (2d) 673, involved false propaganda and misleading publications and statements, as well as conspiracy to boycott another business exchange—all of which hindered competition in violation of the Federal Trade Commission Act; the case of *Hills Brothers Co. v. Federal Trade Commission,* 9 Fed. (2d) 481, as heretofore shown, was one of refusal to sell to dealers who failed to adhere to a resale price maintenance plan. The last case mentioned by petitioner under this heading, *Farmers Live Stock Commission Company v. United States,* 54 Fed. (2d) 375, arose under the differing provisions of the Packers and Stock Yards Act, 42 Stats. 159, and involved charges of unfair and discriminatory practices in an illegal boycott of certain live stock market agencies.

The line of demarcation between these cases and the instant case is so distinct that petitioner betrays the weakness of its case by their citation. In urging these cases in support of the proposition stated, petitioner missed the point completely. Where there is an evident method of unfair competition such as each of these cases involved, it is of course no defense that competitors are free to engage in the same practice. But where the gravamen of the action is unfair competition based on practices contrary to public policy, because of their tendency to hinder competition or create a monopoly, it is of the very essence to show that monopoly can not in the nature of things exist because no attempt is made to prevent competitors from using the same sales methods.

This analysis of petitioner's argument shows how palpably strained is the contention that the Commission has jurisdiction over the sales practice involved. Petitioner has resorted both before the Circuit Court of Appeals and in its petition to this court, to unjustified applications of the doctrine of cases which are not pertinent, and to distorted construction of decisions on entirely different questions and with entirely different facts; and finally under

this point of the brief is driven to rely on isolated expressions from these inapplicable decisions. It is axiomatic that sentences can not be torn from their context to support an argument on an unrelated situation.

Thus, in summary, the petition presents merely (a) the importance of the case and (b) the doctrine of the *Winsted* and similar cases, in support of the application for the writ. The latter is inapplicable and the former no basis for favorable action by this court, in the absence of an affirmative showing of jurisdiction. Mere importance, no matter how great, can not change the scope of the organic act and enlarge the functions of the Commission which this court has repeatedly recognized to be one of "strictly limited" jurisdiction. *Federal Trade Commission v. Klesner,* 280 U. S. 19, 27.

CONCLUSION.

The instant case involves only the application of well-settled principles to the peculiar facts of a particular situation. It presents no conflict of decisions. The petition should be denied.

Respectfully submitted,

JOHN A. COYLE,
110 E. King St.,
Lancaster, Pa.

GEO. E. ELLIOTT,
Shoreham Bldg.,
Washington, D. C.
Of Counsel.

July, 1933.